

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals, District of Columbia

JANUARY TERM, 1901.

No. 1049.

64

PRIMO FONTANO, APPELLANT,

vs.

MARY HELEN CARROLL ROBBINS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED FEBRUARY 7, 1901.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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In the Court of Appeals of the District of Columbia.

PRIMO FONTANO, Appellant,
vs.
MARY HELEN CARROLL ROBBINS. } No. 1049.

a Supreme Court of the District of Columbia.

PRIMO FONTANO
vs.
MARY HELEN CARROLL ROBBINS. } No. 42237. At Law.

UNITED STATES OF AMERICA, } ss :
District of Columbia,

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit :

1 *Declaration, &c.*

Filed June 13, 1898.

In the Supreme Court of the District of Columbia, the 13th Day of June, 1898.

PRIMO FONTANO
vs.
MARY HELEN CARROLL ROBBINS. } Law. No. 42237.

The plaintiff sues the defendant for that heretofore, to wit, on the 19th day of August, 1895, at Washington city, in the District of Columbia, by a certain agreement then and there made, one part of which, sealed with the seal of said defendant, the plaintiff now brings here into court, the date whereof is the same day and year aforesaid, by which agreement the plaintiff did covenant and agree with the defendant, in consideration of the fulfillment of the agreement above mentioned, made by the defendant while unmarried and in her maiden name of Mary Helen Carroll, as follows :

Article 1. The contractor under the direction and to the satisfaction of Heins and La Farge, architects, shall and will provide all the materials and perform all the work mentioned in the specifications and shown on the drawings prepared by said architect for the interior marble finish of the chapel of Saint Anthony of Padua, in

the church of Saint Matthew, Washington, D. C., including the ceiling of decorative plaster-work and the three windows of transparent alabaster, all set up in place complete, which drawings and specifications are identified by the signatures of the parties hereto.

It was further agreed :

Article 3. That no alterations shall be made in the work shown or described by the drawings and specifications, except upon a written order of the architects, and when so made, the value of the work added or omitted shall be computed by the architects, and the amount so ascertained shall be added to or deducted from the contract price. In the case of dissent from such award by either party hereto, the valuation of the work added or omitted shall be referred to three (3) disinterested arbitrators, one to be appointed by each of the parties to this contract, and the third by the two thus chosen ; the decision of any two of whom shall be final and binding, and each of the parties hereto shall pay one-half of the expense of such reference.

It was further provided in said agreement :

Article 6. That the plaintiff should complete the several portions and the whole of the work comprehended in said agreement by and at the time or times hereinafter stated, namely, on or before the first day of October A. D. 1896.

It was further provided in said agreement :

Article 8. That the defendant should provide all labor and materials not included in said contract in such manner as not to delay the material progress of the work, and in the event of failure so to do; thereby causing loss to the plaintiff, agrees that she will reimburse him for such loss ; and the plaintiff agreed that if he shall delay the material progress of the work so as to cause any damage for which the defendant shall become liable (as above stated), then he shall make good to her any such damage. The amount of such loss or damage to either party hereto, shall, in every case, be fixed and determined by the architects or by arbitration, as provided in art. III of this contract.

It was further provided in said contract :

Article 9. That the sum to be paid by the defendant to the plaintiff for said work and materials should be \$28,000.

And the plaintiff avers that he has completely performed his part of said agreement, and that his work and materials have been accepted, and that the final payment has been made to him after the acceptance of said work and materials, and that the same has been received by the defendant as satisfactory in every respect.

The plaintiff further avers that he was ready to commence setting the marble in said chapel on the 10th day of June, 1897, at which time he came to Washington, D. C., for that purpose, and brought a skilled laborer with him to aid in setting the marble, and he further avers that had the chapel been in readiness for setting the marble he could and would have completed his contract in the space of three months.

The plaintiff further avers that when he arrived in Washington with his material and workmen, to wit, on the 10th day of June, 1897, said chapel had not been roofed in, nor had the walls been built up to their full height, and in consequence it was then impossible to place in position the marble-work called for under said contract, and that he has been delayed waiting for said chapel to be put up in accordance with the terms of said contract 150 days, to the damage of the plaintiff to the amount of \$3,888.10, as per bill of particulars hereto attached; and the defendant, having by the plaintiff been requested to pay the same, has declared that she is entirely without liability in regard to said claim and declines to pay the same. Wherefore the plaintiff claims judgment for the amount of said claim, with interest from the 13th day of June, 1898, besides full costs of suit.

O. D. BARRETT,
Att'y for Plaintiff.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

O. D. BARRETT,
Att'y for Plaintiff.

5 *Bill of Particulars.*

Mrs. Mary Helen Carroll Robbins, *née* Carroll, to Primo Fontano,
Dr.

1898.

May 23.	To time lost while waiting for the chapel of St. Matthew's church to be put in readiness so that the marble-work in said chapel could be put up in accordance with the terms of the contract between said Fontano and said Mrs. Robbins, 150 days at \$15 per day.....	\$2,250.00
May 23.	To cash paid to workman C. Zambelli during the above-mentioned time in which he could not go on with his work, 150 days at \$4 per day	600.00
	To cash paid for extra storage at custom-house on marble while waiting for chapel to be put in readiness for interior work.....	339.10
	To cash paid for extra cartage in hauling marble second time.....	144.00
6	To interest for six months on delayed payment of \$18,500.....	555.00
Total.....		<u>\$3,888.10</u>

Plea.

Filed July 7, 1898.

In the Supreme Court of the District of Columbia.

PRIMO FONTANO	}	At Law. No. 42237.
vs.		
MARY HELEN CARROLL ROBBINS.		

Now comes the defendants in the above-entitled cause, and for plea to the declaration filed therein says that she demands oyer of the sealed writing in said declaration mentioned; and, the same having been exhibited to her, she avers that in all respects she performed all the conditions and obligations assumed by her to be performed in said writing obligatory, and she says that she provided all labor and materials agreed by her to be provided upon the building referred to in said declaration in such manner as not to delay the material progress of the work to be performed by the plaintiff, and that she fully paid the plaintiff for all the work done by him under his contract with her; and this defendant is ready to verify.

HAMILTON & COLBERT,
Attorneys for Defendant.

Amendments to Declaration.

Filed July 22, 1898.

In the Supreme Court of the District of Columbia.

PRIMO FONTANO	}	Law. No. 42237.
vs.		
MARY HELEN CARROLL ROBBINS.		

The plaintiff amends his declaration and bill of particulars in the above-entitled cause as follows:

I. By striking out the word "he" between the words "time" and "came," in the third line of the next to the last paragraph, and inserting in its place the words "his brother."

II. By striking out the word "he" between the words "when" and "arrived," in the first line of the last paragraph of declaration, and inserting in its place the words "his brother."

III. By inserting after the word "time," in the first line of the first item of the bill of particulars, the words "of plaintiff's agent, Coriolano Fontano."

IV. By striking out of the line next to the last of the first item of the bill of particulars the words "said Fontano" and inserting the words "the plaintiff."

O. D. BARRETT,
Attorney for Plaintiff.

We consent to the filing of the within amendments.

HAMILTON & COLBERT,
Att'ys for Defendant.

Joinder in Issue, &c.

Filed July 22, 1898.

In the Supreme Court of the District of Columbia, the 22nd Day of
July, 1898.

PRIMO FONTANO	}	Law. No. 42237.
<i>vs.</i>		
MARY HELEN CARROLL ROBBINS.		

The plaintiff joins issue upon the defendant's plea.

O. D. BARRETT,
Attorney for Plaintiff.

9 Take notice that the issue joined in the above-entitled
cause will be tried at the next term of this court.

O. D. BARRETT,
Attorney for Plaintiff.

To Messrs. Hamilton and Colbert, attorneys for defendant.

Memorandum.

December 19, 1900.—Verdict for defendant.

Order Fixing Amount of Appeal Bond, &c.

Filed December 20, 1900.

In the Supreme Court of the District of Columbia.

PRIMO FONTANO	}	At Law. No. 42237.
<i>vs.</i>		
MARY HELEN CARROLL ROBBINS.		

10 On motion of the plaintiff an appeal bond in the above-
entitled cause is fixed at one hundred dollars, or in place
thereof a cash deposit of fifty dollars will be accepted.

A. C. BRADLEY, J.

Supreme Court of the District of Columbia.

WEDNESDAY, *December 26th*, 1900.

Session resumed pursuant to adjournment, Mr. Justice Bradley
presiding.

PRIMO FONTANO, Plaintiff,	}	No. 42237. At Law.
<i>vs.</i>		
MARY HELEN CARROLL ROBBINS, Defendant.		

The time within which to file a motion for a new trial herein hav-
ing expired, judgment on verdict is ordered. Therefore it is consid-

ered that the plaintiff take nothing by his suit, and the defendant go thereof without day and recover against the plaintiff the costs of her defense, to be taxed by the clerk, and have execution thereof.

11

Order for Appeal and Citation.

Filed December 27, 1900.

In the Supreme Court of the District of Columbia, the 26th Day of December, 1900.

PRIMO FONTANO	}	At Law. No. 42237.
<i>vs.</i>		
MARY HELEN CARROLL ROBBINS.		

The clerk of said court will please enter an appeal from the judgment rendered in the above case and issue citation of appeal.

O. D. BARRETT,
Attorney for Plaintiff.

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In the Supreme Court of the District of Columbia.

PRIMO FONTANO	}	At Law. No. 42237.
<i>vs.</i>		
MARY HELEN CARROLL ROBBINS.		

The President of the United States to Mary Helen Carroll Robbins,
Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal filed in the clerk's office of the supreme court of the District of Columbia on the 27th day of December, 1900, wherein Primo Fontano is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.	Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 27th day of December, in the year of our Lord one thousand nine hundred (1900).
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JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 27th day of December, 1900.

HAMILTON & COLBERT,
Attorneys for Appellee.

13

Memoranda.

1900, December 28.—Appeal bond filed.

1900, December 28.—Term prolonged fifteen (15) days to settle exceptions.

1901, January 11.—Term prolonged till January 25, 1901, to settle exceptions.

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Supreme Court of the District of Columbia.

TUESDAY, *January 22d*, 1901.

Session resumed pursuant to adjournment, Mr. Justice Bradley presiding.

* * * * *

PRIMO FONTANO, Plaintiff,

vs.

MARY HELEN CARROLL ROBBINS, Defendant.

} No. 42237. At Law.

Now again comes here the plaintiff herein, by his attorneys, and tenders to the court here his bill of exceptions taken during the trial of this cause, and prays that it may be duly signed, sealed, and made part of the record, now for then, which is accordingly done.

15

Bill of Exceptions.

Filed January 22, 1901.

In the Supreme Court of the District of Columbia.

PRIMO FONTANO

vs.

MARY HELEN CARROLL ROBBINS.

} At Law. No. 42237.

Be it remembered that on the 18th day of December, 1900, the above-entitled cause came on for trial before Mr. Justice Bradley and a jury; and thereupon the plaintiff, to maintain the issues on his part joined, called CARIOLANO FONTANA, who testified in substance as follows:

That he is a brother of the plaintiff, and that he came to America in 1895 to procure, on behalf of his brother, the contract from the defendant for the interior marble-work of the Chapel of St. Anthony of Padua in the church of St. Matthews, in Washington; that his brother was awarded the contract, and that the same was drawn up and signed by the defendant before witness returned to Italy; that the drawings and specifications connected with the contract had been sent to his brother before witness came to America, and that his brother's estimate for the doing of the work was based upon the drawings and specifications previously furnished by the architects named in the contract; that the contract duly executed by the defendant was sent to Italy for his brother's signature, and that the same was received and signed by his

16

brother in October, 1895; that the names of Guiseppe Lagomarsini and Bologna Ferdinando, subscribed to the contract, *was* signed as witnesses and not as parties to the contract; that he was present and saw his brother and the witnesses sign; that the witness was here handed the contract and identified the same as the contract executed by his brother, Primo Fontana, and the defendant, Mary Helen Carroll, and the said contract, which was introduced in evidence with the consent of the defendant and read to the jury, is as follows:

"This agreement, made the nineteenth day of August in the year one thousand eight hundred and ninety-five, by and between Professor Primo Fontana of the city of Carrara, Italy, party of the first part (hereinafter designated the contractor), and Mary Helen Carroll of Howard county, State of Maryland, U. S. A., party of the second part (hereinafter designated the owner),

Witnesseth, that the contractor, in consideration of the fulfillment of the agreements herein made by the owner agrees with the said owner, as follows:

Article 1. The contractor under the direction and to the satisfaction of Heins and La Farge, architects, shall and will provide all the materials and perform all the work mentioned in the specifications and shown on the drawings prepared by the said architects for the interior marble finish of the Chapel of St. Anthony of Padua, in the church of St. Matthew, Washington, D. C., including the ceiling of decorative plaster-work and the three windows of transparent alabaster all set up in place complete, which drawings and specifications are identified by the signatures of the parties hereto.

Article 2. The architects shall furnish to the contractor such further drawings or explanations as may be necessary to detail and illustrate the work to be done, and the contractor shall conform to the same as part of this so far as they may be consistent with the original drawings and specifications referred to and identified, as provided in article 1.

It is mutually understood and agreed that all drawings and specifications are and remain the property of the architects.

Article 3. No alterations shall be made in the work shown or described by the drawings and specifications, except upon a written order of the architects, and when so made, the value of the work added or omitted shall be computed by the architects, and the amount so ascertained shall be added to or deducted from the contract price. In the case of dissent from such award by either party hereto, the valuation of the work added or omitted shall be referred to three (3) disinterested arbitrators, one to be appointed by each of the parties to this contract, and the third by the two thus chosen; the decision of any two of whom shall be final and binding, and each of the parties hereto shall pay one-half of the expenses of such reference.

Article 4. The contractor shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the architects or their authorized representatives. He shall, within

twenty-four hours after receiving written notice from the architects to that effect, proceed to remove from the grounds or buildings all materials condemned by them, whether worked or unworked, and to take down all portions of the work which the architects shall by like written notice condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications.

Article 5. Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the architects, the owner shall be at liberty, after ten days' written notice to the contractor to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract; and if the architects shall certify that such refusal, neglect, or failure is sufficient ground for such action, the owner shall also be at liberty to terminate the employment of the con-

19 tractor for the said work and to enter upon the premises and take possession for the purpose of completing the work comprehended under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the contractor he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor, but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner. The expense incurred to the owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default shall be audited and certified by the architects, whose certificate thereon shall be conclusive upon the parties.

Article 6. The contractor shall complete the several portions, and the whole of the work comprehended in this agreement by and at the time or times hereinafter stated, namely, on or before the first day of October, A. D. eighteen hundred and ninety-six.

Article 7. Should the contractor be obstructed or delayed in the prosecution or completion of his work by the act, neglect, delay or default of the owner, or the architects, or of any other contractor employed by the owner upon the work, or by any damage which may happen by fire, lightning, earthquake, breakage or cyclone, or by the abandonment of the work by the employees through no default of the contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid; but no such allowance shall be made unless a claim therefor is presented in writing to the architects within twenty-four

hours of the occurrence of such delay. The duration of such extension shall be certified by the architects, but appeal from their decision may be made to arbitration, as provided in art. 3 of this contract.

Article 8. The owner agrees to provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work, and in the event of failure so to do, thereby causing loss to the contractor, agrees that he will reimburse the contractor for such loss; and the contractor agrees that if he shall delay the material progress of the work so as to cause damage for which the owner shall become liable (as above stated) then he shall make good to the owner any such damage. The amount of such loss or damage to either party hereto shall, in every case, be fixed and determined by the architects or by arbitration, as provided in art. 3 of this contract.

Article 9. It is hereby agreed between the parties hereto that the sum to be paid by the owner to the contractor for said work
21 and materials shall be \$28,500—twenty-eight thousand five hundred dollars, subject to additions and deductions as hereinbefore provided, and that such sum shall be paid in current funds by the owner to the contractor in installments, as follows:

Ten thousand (\$10,000) dollars on signing of this contract by Professor Primo Fontana in person and the execution of a bond by said Fontana in the penal sum of fifteen thousand (\$15,000) dollars conditioned on the faithful performance of this contract with sureties citizens of America to be approved by the party of the second part or the aforesaid architects, and balance after the completion of this work. The final payments shall be made within sixty days after this contract is fulfilled.

All payments shall be made upon written certificates of the architects to the effect that such payments have become due and not otherwise.

If at any time there should be evidence of any lien or claim for which, if established, the owner or the said premises might become liable, and which is chargeable to the contractor, the owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify him against such lien or claim. Should there prove to be any such claim after all payments are made, the contractor shall refund to
22 the owner all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the contractor's default.

Article 10. It is further mutually agreed between the parties hereto that no such certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

Article 11. The owner shall during the progress of the work maintain full insurance on said work, in his own name and in the name

of the contractor, against loss or damage by fire. The policies shall cover all work incorporated in the building, and all materials for the same in or about the premises, and shall be made payable to the parties hereto, as their interests may appear.

Article 12. The said parties for themselves, their heirs, executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained.

In witness whereof, the parties to these presents have hereunto set their hands and seals, the day and year first above written."

In presence of—

PROF. PRIMO FONTANA.	[SEAL.]
GUISEPPE LAGOMARSINI.	[SEAL.]
BOLOGNA FERDINANDO.	[SEAL.]
MARY HELEN CARROLL.	[SEAL.]

23 Witnesses to signature of Mary Helen Carroll :
G. E. HAMILTON.

The witness further testified that upon his return to Italy in 1895, and after the signing of the contract, his brother immediately began the work on the stone preparatory to having the same ready to be set up in the chapel and completed within the time provided in the contract; that about March, 1896, a considerable portion of the cut stone was shipped to America, and that in June, 1896, practically all of the marble was cut and ready to be shipped to America, but, owing to the fact the plaintiff learned at that time that the walls of the chapel had not been completed, and that the roof had not been begun, the plaintiff did not forward the balance of the stone to America, as he was about to do; that as soon as plaintiff thus learned that said walls and roof were not completed he wrote at once to the architects requesting them to complete the same immediately; as he was ready to put up the marble, but no answer was received from the architects; that the plaintiff thereafter, between June and October, 1896, and afterwards wrote repeatedly to the architects urging them to complete the walls and the roof in order that he might complete the work as provided in the contract, but the plaintiff did not

24 hear from the architects; that plaintiff was ready to begin the setting of the marble in June, 1896, and could have completed his part of the contract before October 1st, 1896, had the walls of the chapel been put up and the roof put on; that marble can be set quicker in summer than in winter; that if he could have begun the setting of the marble in June, 1897, he could have completed the same within from two to three months; that the specifications which were made a part of the contract provided that the work of setting the marble should not begin until the walls were up and the roof on.

The witness was here handed the specifications and identified the same as the specifications furnished the plaintiff as a part of the contract. The specifications, which were introduced in evidence with the consent of the defendant and read to the jury, provide, among other things, as follows:

"The outside walls will be built, rough concrete floor finished and the chapel will be roofed in when the contractor commences to set marble-work. All brick-work supported on the columns of chapel will be done by owner's brick-masons at such times and in such manner as the contractor may require; the contractor must, however, keep these brick-masons under his supervision and so arrange that they shall do no damage to his finished work or materials on the ground."

25 "Should any dispute arise respecting the true construction or meaning of the drawings or specifications, the same shall be decided by the architects, and their decision being just and impartial, shall be final and conclusive."

"The contractor is to furnish all necessary materials, labor and transportations, and is to provide all tools, derricks, scaffolding, and all other necessary means, utensils, and appliances for properly prosecuting his work."

"Particular care must be taken by the contractor as the building progresses of all finished work, which work must at all times be covered up and thoroughly protected from injury or defacement."

The witness further testified that this incomplete condition of the walls and roof continued, and that by direction of the plaintiff he came to America on June 11, 1897, and went immediately to see the architects, Hines and La Farge, and told them that his brother has been delayed for nearly a year in the erecting of the marble-work, owing to the walls not being up and the roof not being on, as provided in the contract and specifications, and urged the architects to put the walls up and the roof on immediately, so that he could begin his setting of the marble, and stated that a considerable part of the marble had been in Washington for over a year, and that the whole of it was now there ready to be put up; but the architects told him that there was no reason for his not commencing and performing his work as provided in the contract. The witness then told the architects

26 that it was impracticable and impossible for him to do the work in the then condition of the walls and roof of the chapel without subjecting the marble-work to injury from breakage and stains; that the architects thereupon told the plaintiff to go down and try to set the marble to please Father Lee; that Father Lee had marble-work to give him if he would please in the performance of this contract. The witness thereupon informed the architects that he would come to Washington, and that he would see what he could do; that he came to Washington and examined the chapel and found that the level of the floor was two inches too low for the setting of his marble; that he thereupon notified the architects and shortly thereafter the witness was himself compelled to raise the steps and platform of the altar; that he found the walls, which were to be 38 feet high, were only 22 feet up, and there was no roof on the chapel, as provided in the specifications. Witness was here shown a letter which he identified. The same was introduced in evidence and read to the jury. The letter is as follows:

725 19TH ST. N. W., WASHINGTON, D. C., 13th July, 1897.

Messrs. Heins & La Farge, architects, Temple court, 7 Beekman street, New York.

27 GENTLEMEN: Referring to my contract with Miss Mary Helen Carroll, under date of August 19th, 1895, relating to the interior marble finish of the chapel of St. Anthony of Padua in the church of St. Matthew, Washington, D. C., I take the liberty to call your attention, as Miss Carroll's architects, to the fact that it is impracticable for me to put up any of the work in said chapel in its present incomplete condition, which I am required by said contract to do, and it is utterly impossible for me to complete said contract until the walls of said chapel shall have been completed and the chapel placed under roof.

I take the liberty to notify you that I have had all my material here for more than a month, ready to put up according to contract, and that I have been in Washington one month at heavy expense, waiting to perform my part of said contract, but have been delayed on account of the incomplete condition of the chapel.

Very respectfully,

PRIMO FONTANA,
p. C. FONTANA.

Witness further testified that he received a reply to his letter of July 13, and the same was identified by him, introduced in evidence, and read to the jury. The letter is as follows:

28 Heins & La Farge, architects, Temple court, 7 Beekman St.,
New York.

JULY 16, 1897.

Mr. C. Fontana, 1725 19th St. N. W., Washington, D. C.

DEAR SIR: We have your note of July 13th, in which you notify us that you cannot go on with the marble-work of the chapel until the roof is on. We venture to differ with you in regard to your interpretation of the clause in the contract to which you refer, for two reasons:

1st. That it is entirely practicable to set your marble-work, so much of it, at least, as is necessary to support the masonry above which rests upon the marble.

2nd. When I visited Washington a week or so ago, at your request, we had agreed that you were to go ahead on this basis.

We have, therefore, to request of you that you will carry out this understanding and commence to set the marble-work upon the outside walls, so far as may be necessary to support the brick-work above.

Our interpretation of the clause in the contract which relates to setting the marble after the roof is on refers to the arcade between the chapel and the church and to the slabs lining the walls.

29 We wish to call your attention to the fact that the general conditions printed on the specifications provide that the architects are to

decide disputes arising respecting the true construction or meaning of the drawings or specifications. We are distinctly of the opinion that it will make a better piece of work to have the columns along the wall and the arches above them set in place before the wall is carried up any higher, as the inside lining wall can then be properly bonded to the outside wall, and the columns themselves can be anchored firmly in place. If you do not proceed as above, you will have to hold yourself answerable for any damages which may occur through your refusal so to do.

Yours very truly,

HEINS & LA FARGE,
Per G. L. HEINS.

Witness further testified that he attempted to do the work and set in place several pieces of marble and some of the skirting, but that after working a day or two there was a heavy rainstorm which prevented him from further carrying on his work, for the reason that the water poured into the space between the marble and the brick walls, thereby damaging the cement and staining the marble; that he thereupon immediately notified the archi-
30 tects that it was impracticable for him to do the work until the walls were up and the roof on.

Witness further testified that he went to see Mr. George E. Hamilton, the attorney for the defendant, but found him out of the city, and that he was at the same time informed that the defendant was in Europe; that upon Mr. Hamilton's return from Europe he called upon him at his office in this city and told him the condition of the walls and the roof, and that he had been here some time at heavy expense and urged him, as the attorney of the defendant, to have the walls erected and the roof put on, in order that he might go on with his work; that Mr. Hamilton told him that he did not know where the defendant was, but that he would write to her father and ascertain, and further told the witness that the plaintiff should suffer no loss on account of the delay; that he was compelled to wait around doing nothing until the latter part of August, 1897, when the witness was informed by Mr. Hamilton that the defendant was in New York; that on the 31st of August he saw the defendant at Coney Island, and that he told her that he was unable to set the marble, owing to the walls of the chapel not being up and the roof not being on, and that he had been here for some time at heavy expense, and urged her to have the walls put up and the roof put on so that he might go on with his work; that the defendant said that she could do nothing, that she had nothing to do with the walls or the roof, and disclaimed all responsibility for anything connected with the building of the
walls or the roof of the chapel, and that witness would

31 have to wait until the chapel was ready to receive the marble-work, and advised the witness to return to Italy until the chapel was ready, and that she further told witness that the plaintiff knew that she had nothing to do with the walls or the roof; that he told the defendant that he could not go back to Italy, as all

his brother's capital was sunk in this job; that some time in September the work of completing the walls was begun, and that some time about the middle of October the work of putting on the roof was begun; that on the 18th day of October, the earliest day practicable, the witness began the setting of the marble in the chapel, and at that time a part of the roof was on—that part immediately above the point where he was setting his marble. Witness further testified that he was further delayed by the architects about a month in furnishing him with a diagram of the ceiling and the size of the rosettes for the doing of the decorative plaster-work on the ceiling of the roof; that on October 6, 1897, the witness wrote to the architects and requested the diagram of the ceiling, but did not receive the diagram as requested, and on December 9, 1897, again wrote to the architects for the diagram; the said letter, which was introduced in evidence and read to the jury, is as follows:

1201 20TH St. N. W.,
WASHINGTON, D. C., 9th Dec., 1897.

32 Messrs. Heins & La Farge, architects, Temple court, 7 Beekman St., New York.

GENTLEMEN: The work on the contract of Prof. Primo Fontana in the chapel of St. Anthony of Padua, at St. Matthew's church, Washington, D. C., has progressed so far that it becomes necessary to request that you forward at once to me the plans for the ceiling. Any delay in furnishing these plans will cause me considerable unnecessary expense, which I wish to avoid. You will recall that the price of this work was agreed to be \$250.00.

You will oblige me greatly by a prompt compliance with my request.

Respectfully yours,

PRIMO FONTANA,
p. C. FONTANA.

That he again wrote to the architects on December 31st, calling their attention to the failure to provide the framework, including the lath to receive the decorative plaster-work. Said letter, which was introduced in evidence and read to the jury, is as follows:

1201 20TH St. N. W.,
WASHINGTON, D. C., 31st Dec., 1897.

33 Messrs. Heins & La Farge, architects, Temple court, 7 Beekman St., New York city, N. Y.

GENTLEMEN: I have to inform you that I am now ready to put up in the chapel in the church of St. Matthew's the ceiling of decorative plaster-work called for in my contract with Miss Mary Helen Carroll under date of August 19th, 1895, and I have further to inform you that nothing has been done towards putting in place the framework, including the lath, to receive said decorative plaster-work, which you on the 16th instant promised me you would have done right away.

You are hereby respectfully notified to have said framework and lathing put in at once and thereby save the expense to Miss Carroll that may result from my having to wait to have said framework and lathing put in.

Respectfully,

PROMI FONTANA,
p. C. FONTANA.

That on January 19th, 1898, witness received the diagram for the decorative ceiling, and was also informed by the architects that the plaintiff would have to provide the framework and laths for receiving the decorative plaster; that, although witness did not
34 consider that plaintiff had to provide the framework and laths to receive the plaster, yet witness did purchase and have put up the frame for this purpose in order to prevent further delays. Witness further testified that he completed the work under the contract for the plaintiff on March 15, 1898, and at once notified the architects, but that he did not receive final payment of \$18,500 until two months later.

Witness further testified that he brought a skilled workman with him from Italy on June 11, 1897, to help him to set the marble; that his brother paid witness while he was in America the sum of \$10 a day and \$5 for his keep; that he paid C. Zambelli the sum of \$4 per day, and that said payments were reasonable; that the items stated in the bill of particulars to the contract were for sums of money actually paid out by his brother, the plaintiff, to witness and to C. Zambelli during the time they were delayed after arriving in this country and before they could go on with the setting of the marble and for the time lost while waiting to get the drawings for the ceiling and also for actual moneys paid by the plaintiff for extra storage of marble at the customs-house, and for extra cartage in hauling the marble a second time and for interest for six months for delayed payment of \$18,500; that the items stated in the bill of particulars are correct and represent actual moneys paid out by the
35 plaintiff and the interest on the delayed payments; that the witness was delayed for 150 days after arriving in America.

Witness further testified that about the time of the institution of this suit he was informed by Mr. Hamilton that the defendant would not pay any expenses or damages which he had sustained. Witness further testified that the reason he came to America in June, 1897, was because his brother was unable to go on with his work at home, owing to the fact that all his capital was tied up in this job; that all the cutting and preparing of the marble had long been completed, and the greater part of it had been in America for about a year; that it was necessary for him to come over in order to urge the completion of the walls and roof, so that the plaintiff could complete his work and get the use of the money which he had tied up in this job; that it was impossible to set the marble in the chapel until the walls were up and the roof on; that the drippings of mortar and cement from the walls and ceilings would have stained and probably ruined his marble-work, and that rain water on marble

tends to discolor it, and that it was impossible to remove the same; that cement and lead are used in setting marble, and these likewise have a tendency to discolor marble if rain water comes in contact with it; that when witness began the setting of the marble on October 18, 1897, he found it necessary to take up and reset the pieces of marble he had set several months previous, owing to the
36 fact that the rain had caused the cement used in setting the marble to rot.

On cross-examination the witness testified that he knew that Father Lee was building the chapel and the church and got from Father Lee a contract for putting in two marble columns in the church; and further testified that he did not remember whether Mr. Hamilton told him before or after the institution of the suit that the defendant would not pay for the loss and damage which the plaintiff had suffered in consequence of the delay; that the witness had never notified the defendant personally about his claim, and that he had never consulted the architects or the defendant in regard to arbitrating his claim.

Witness further testified on cross-examination that the final payment was made sixty days after the work was completed, as provided in the contract, and that the item of interest referred to in the bill of particulars is computed for six months from the time he could have completed the marble-work had the walls been up and the roof on at the time he arrived in America, in June 1897.

That there was an inner and outside wall to said chapel, according to the plans; that the inner wall was to be built 32 feet high; that on top of the marble columns was to be brick masonry up to the roof; that the marble-work had to be carried up together for the reason that if the columns had been set in place it would
37 have been impossible to set the marble slabs which lined the wall behind the columns, owing to the columns being required to be set very close to the walls; that he did not have room to work behind the columns.

Plaintiff, further to prove the issues on his part joined, called JAMES A. CLARKSON and WILLIAM L. BELT as witnesses, who gave evidence tending to prove that the walls of the chapel were not begun until some time during the latter part of September, 1897, and that Mr. Fontana began the setting of the marble in October; that the roof was only partially on, and that the work of putting on the roof was not begun until some time about the middle of October. These witnesses further gave evidence tending to prove that rain water on marble tends to discolor it, and the spots and stains are impossible to remove.

These witnesses testified on cross-examination that they were employed by Robert S. Clarkson, who had the contract for the brick-work to be done on said chapel and church with Father Lee; that they put up the brick walls of said chapel, and were under the orders and directions of Father Lee and his architects, Hines & La Farge, and that they were paid by Father Lee; that they did not

know Miss Carroll in the matter of their contract, received no orders from her, and that she was a stranger to them in the matter; that the work upon the brick walls would not interfere with or prevent the marbleman from working, but that it was not practicable to put in the marble-work before the roof was on.

38 It was admitted in evidence that the defendant was married in the spring of 1897, and that her husband was then and is now a resident of New York. This was the substance of all the evidence introduced.

Thereupon the plaintiff rested.

The defendant then moved the court to direct the jury to return a verdict in favor of the defendant on the grounds following, to wit:

1. That the proof submitted by the plaintiff does not make out a case entitling the plaintiff to recover against the defendant; and,

2. That the plaintiff has failed to prove a reference to arbitration before bringing suit, which said reference to arbitration is required as a condition precedent to a right of action on the part of the plaintiff.

The court granted the motion of the defendant and directed the jury to return a verdict in favor of the defendant.

To the rulings of the court in granting the motion of the defendant and the directing of the jury to return a verdict for the defendant the plaintiff, by his counsel, excepted, and said exception was noted upon the minutes of the court, and said counsel prayed the court to sign and seal this the plaintiff's bill of exceptions to said rulings, which is accordingly done, *nunc pro tunc*, this 22d day of January, 1901.

A. C. BRADLEY, *Justice*. [SEAL.]

39

Order for Transcript of Record.

Filed January 24, 1901.

In the Supreme Court of the District of Columbia, the 24th Day of January, 1901.

FONTANA	}	At Law. No. 42237.
vs.		
ROBBINS.		

The clerk of said court will please prepare a transcript of record consisting of the declaration, amendment to declaration, plea, joinder in issue, and bill of exceptions.

BENJAMIN S. MINOR,
Attorney for Plaintiff.

40 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, }
District of Columbia, } ss :

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 39, inclusive, to be a true and correct transcript of the record, as per the directions of counsel herein filed, and copy of which is made part hereof, in cause No. 42237, at law, wherein Primo Fontano is plaintiff and Mary Helen Carroll Robbins is defendant, as the same remains upon the files and of record in said court.

In testimony whereof I hereunto subscribe
Seal Supreme Court my name and affix the seal of said court, at
of the District of the city of Washington, in said District, this
Columbia. 7th day of February, A. D. 1901.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1049. Primo Fontano, appellant, vs. Mary Helen Carroll Robbins. Court of Appeals, District of Columbia. Filed Feb. 7, 1901. Robert Willett, clerk.